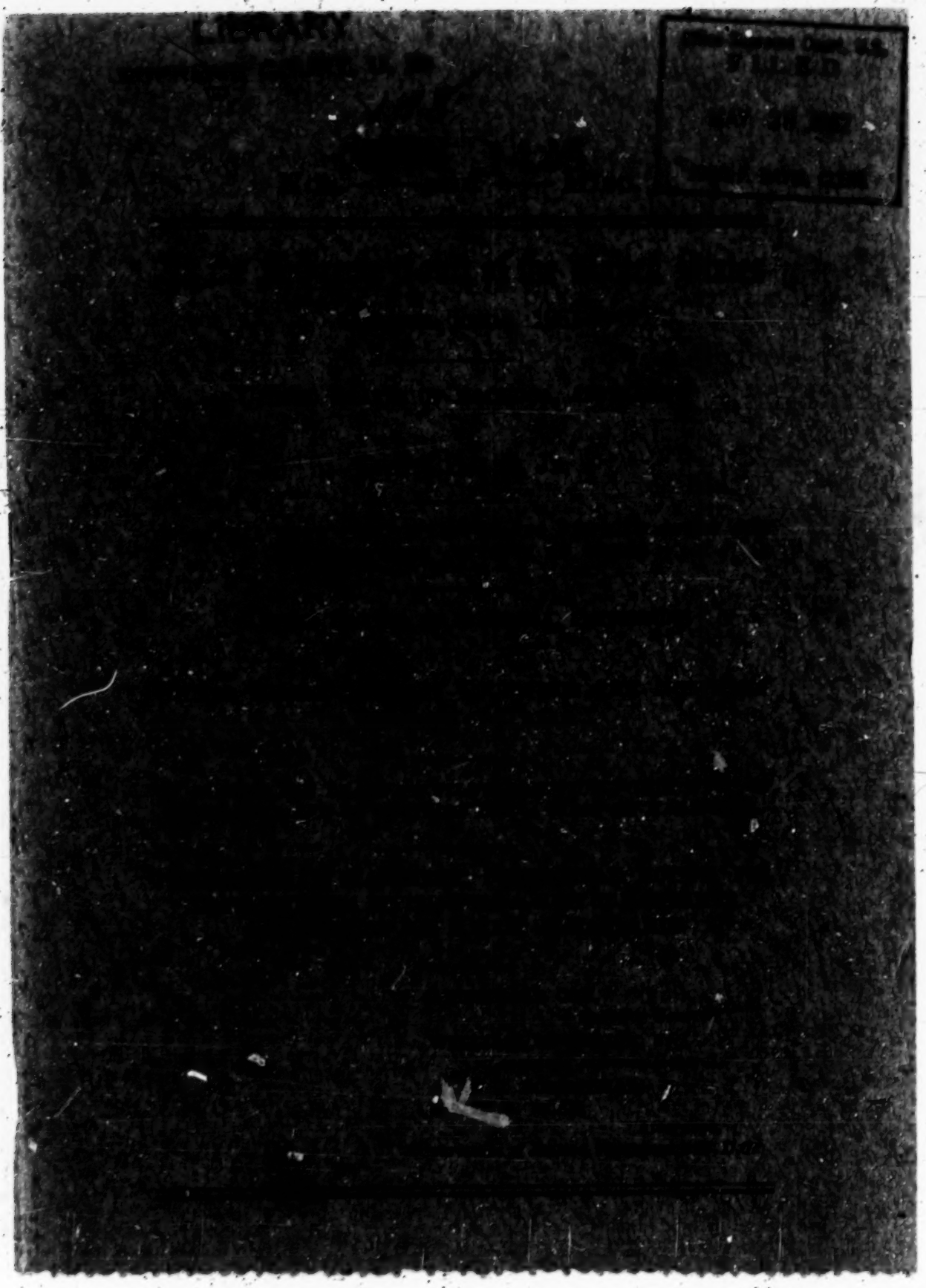

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No.

UNITED STATES OF AMERICA, APPELLANT

v.

EVETTS HALEY, JR.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Texas (App. E, *infra*, pp. 18a–25a) is not reported. An earlier opinion of the district court in this case (App. A, *infra*, pp. 1a–13a) is reported at 166 F. Supp. 336, and the decision of this Court on a prior appeal (App. C, *infra*, p. 16a) is reported at 358 U.S. 644.

JURISDICTION

This suit was instituted in federal district court under Section 376 of the Agricultural Adjustment Act of 1938, as amended, 7 U.S.C. 1376, to collect civil

penalties on appellee's "farm marketing excess" of wheat with respect to the 1956 marketing year. A judgment (App. B, *infra*, p. 14a) was entered for appellee on October 17, 1958, holding the Agricultural Adjustment Act of 1938 unconstitutional. That judgment was reversed by this Court. 358 U.S. 644.

An February 26, 1962, the district court entered an order denying the motion of the United States for judgment (App. F, *infra*, p. 26a), on the ground that this Court's reversal of the district court's original judgment was void for want of jurisdiction (App. E, *infra*, pp. 18a–25a). Notice of appeal from the order of February 26, 1962, was filed on March 28, 1962.

The jurisdiction of this Court to review by direct appeal the order of February 26, 1962, which would reinstate the original decision of the district court holding an Act of Congress unconstitutional, is conferred by 28 U.S.C. 1252. Jurisdiction is also conferred by that statute to enforce the original judgment and mandate of this Court in this case. *Baltimore & O. R. Co.* v. *United States*, 279 U.S. 781, 785. See, also, *In re Potts*, 166 U.S. 263, 265; *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255–56.[1]

STATUTES INVOLVED

The relevant provisions of the Agricultural Adjustment Act of 1938, as amended, 7 U.S.C. 1301(b), 1335,

[1] In the event the Court should decide against assuming jurisdiction of this case as a direct appeal, the United States is submitting herewith a conditional motion for leave to file a petition for a writ of mandamus and a petition for a writ of mandamus. See pp. 13–16, *infra*.

1340, and of 28 U.S.C. 1252 and 1651, are set forth in Appendix G, *infra*, pp. 27a–29a.

QUESTION PRESENTED

Whether a district court could properly ignore the mandate of this Court reversing its judgment and adhere to its original judgment on the ground that this Court had no jurisdiction and that its mandate was therefore void.

STATEMENT

Appellee operates a farm in Sequoyah County, Oklahoma. In 1955 he was notified by the Sequoyah County Agricultural Stabilization and Conservation Committee, which is authorized to administer marketing quotas for wheat in that county under the provisions of the Agricultural Adjustment Act of 1938, that the wheat acreage allotment for his farm in 1956 would be zero acres. In 1956 the Committee informed him that he had overplanted this allotment by 43 acres and that his "farm marketing excess" on this overplanting was 473 bushels of wheat; accordingly it demanded a civil penalty in the amount of $506.11. Upon his refusal to pay, the United States brought the present action to recover the penalty in the United States District Court for the Northern District of Texas (where appellee resides).

In response to the complaint, appellee alleged by way of affirmative defense (1) that the Agricultural Adjustment Act of 1938 is unconstitutional and (2) that there had been no compliance with certain conditions precedent to the valid establishment of a wheat acreage allotment for appellee's farm. At the trial, appellee's evidence did not controvert the factual

allegations of the complaint. However, appellee testified that all of his farm-marketing-excess wheat had been harvested, processed and then fed to livestock on his farm, which livestock were then sold.

In an opinion rendered on September 10, 1958, the district court (T. Whitfield Davidson, J.) found that appellee had used all of his wheat as feed for his livestock and that none of it had entered interstate commerce (App. A, *infra*, pp. 1a, 7a–8a). The court ruled that the Agricultural Adjustment Act of 1938 was therefore unconstitutional as applied to appellee, because wheat consumed on the farm, rather than marketed as such, was not within the power of Congress to regulate under the Commerce Clause (*id.* at pp. 1a–6a). The court then stated, "I am not going to base this decision solely on this point" because a non-constitutional ground for decision should be employed where available (*id.* at p. 6a). However, the court did not discuss any non-constitutional issue but, instead, disposed of the notion that the Act could be sustained under the General Welfare Clause of the Constitution (*id.* at pp. 6a–7a) and then returned to the proposition that the constitutional concept of "commerce" did not embrace the "production" involved in the case (*id.* at pp. 7a–13a). The court did not discuss appellee's alternative defense, that conditions precedent to the valid establishment of a wheat acreage allotment had not been complied with. On the basis of this opinion, the court, entered judgment in favor of appellee (App. B, *infra*, p. 14a).

The United States took a direct appeal to this Court under 28 U.S.C. 1252 on the ground that the district

court's decision had held the Agricultural Adjustment Act of 1938 unconstitutional. The government pointed out that the Court, in *Wickard* v. *Filburn*, 317 U.S. 111, had sustained the application of the Act to a situation in no significant respect different from appellee's.[2] Appellee opposed jurisdiction and moved to dismiss or affirm for the reason (among others) that the district court had not held the Act unconstitutional but had merely held that the interpretation and administration of it with respect to appellee was illegal.[3]

This Court summarily reversed the decision of the district court with a *per curiam* opinion that stated simply: "The judgment is reversed. *Wickard* v. *Filburn*, 317 U.S. 111." 358 U.S. 644 (App. C, *infra*, p. 16a). Appellee's motion to vacate the Court's judgment was denied, 359 U.S. 977, as was his motion for rehearing, in which he again argued that the Court was without jurisdiction because there had been no judgment holding an Act of Congress unconstitutional.[4] 359 U.S. 981. The mandate of this Court, which issued on February 24, 1959, reversed the dis-

[2] Jurisdictional Statement in No. 587, Oct. Term 1958, pp. 1–2, 3–5.

[3] Statement Opposing Jurisdiction and Motion to Dismiss or Affirm in No. 587, Oct. Term, 1958, pp. 3–5. Appellee also argued that the Act is unconstitutional under this Court's decision in *United States* v. *Butler* (297 U.S. 1), *id.* at pp. 11–13.

[4] Motion for Rehearing in No. 587, Oct. Term, 1958, pp. 2–5. Appellee also argued that the Act should be held unconstitutional, *id.* at pp. 5–9.

trict court's judgment and remanded the case to the district court (App. D, *infra*, p. 17a).[5]

No other action having been taken on the case, the United States on February 1, 1962, moved for judgment in its favor. The district court phrased the question before it as follows (App. E, *infra*, p. 18a):

> The main question that struck me yesterday on my investigation is, "Had the Supreme Court ever received jurisdiction of the matter on which it attempted to pass," if it did not, then any action it took would be void.

The court determined that the only possible basis for jurisdiction on the part of the Supreme Court was that an Act of Congress had been declared unconstitutional; the court then ruled that it had not, in its original decision, held any Act of Congress unconstitutional (*id.* at pp. 19a–21a). Again, the district court did not rule on appellee's alternative argument that there had been no compliance with conditions precedent to the valid establishment of a wheat acreage allotment.

On the basis of its opinion concluding that this Court's judgment of reversal and its mandate were "void" for lack of jurisdiction, the district court on February 26, 1962, entered a formal order denying the motion of the United States for judgment (App. F, *infra*, p. 26a). The effect of this opinion and order was to reinstate the original judgment in favor

[5] The United States had suggested that the case be remanded to the district court "for such further proceedings as may be necessary to determine all questions, other than constitutionality of the statute, which are in issue." Jurisdictional Statement, note 2, *supra*, at p. 5.

of appellee (App. B, *infra*, p. 14a) that had been reversed by this Court, so that it was unnecessary to enter any further judgment in his favor.

THE QUESTION IS SUBSTANTIAL

Although disclaiming "any intention of attempting to set aside or to ignore any order of the Supreme Court of the United States,"[6] the court below has in point of fact refused to comply with a mandate of this Court directed to it. That the district court's refusal is indirect—taking the form of an improper inquiry into this Court's jurisdiction and an erroneous conclusion that this Court was without jurisdiction—makes that refusal no less in derogation of this Court's authority. The district court's disregard of this Court's judgment and mandate is inconsistent with the orderly administration of justice, and this Court should exercise its jurisdiction to secure the enforcement of its judgment and mandate.

1. The effectiveness of the administration of justice throughout the judicial systems of the United States would be seriously jeopardized if an inferior court that received this Court's mandate were free to conduct an inquiry into the Court's jurisdiction to issue the mandate and, accordingly, to decide whether or not to follow it. Having received this Court's mandate, the lower court "cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error,

[6] App. E, *infra*, p. 25a. The court went on to state, "In all deference to the Supreme Court if I be out of order, the high court now and here has my apologies." *Ibid.*

upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded." *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255. In short, the lower court must follow the mandate.

The question of this Court's jurisdiction to entertain the original appeal was, of course, squarely presented at the time of that appeal. The government based its allegation of jurisdiction solely upon the provision, 28 U.S.C. 1252, conferring jurisdiction upon this Court to review by direct appeal decisions of lower courts declaring Acts of Congress unconstitutional.[7] Appellee opposed juridiction expressly on the ground that the district court had *not* held the Agricultural Adjustment Act of 1938 unconstitutional, but had merely disagreed with the Department of Agriculture's interpretation and administration of the Act.[8] In reversing the judgment of the district court, this Court necessarily ruled that it had jurisdiction to do so. Since this Court had power to pass upon and sustained its own jurisdiction, the district court plainly exceeded its authority when it inquired into the validity of that determination. Its sole duty under the circumstances was to comply with this Court's judgment and mandate, *Baltimore & O. R. Co.* v. *United States*, 279 U.S. 781, 785; *In re Sanford Fork & Tool Co., supra*, and its refusal to comply should be promptly corrected.

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[7] Jurisdictional Statement, note 2, *supra*, at pp. 1–2.

[8] Statement Opposing Jurisdiction and Motion to Dismiss or Affirm, note 3, *supra*, pp. 1, 2, 4, 5, 8.

2. It is also clear that this Court did have jurisdiction on the prior appeal. While the purport of many passages in the district court's original opinion is somewhat unclear, a fair reading of the opinion as a whole leaves the reader convinced that the sole basis for decision was that the Agricultural Adjustment Act of 1938 was unconstitutional as beyond the authority of Congress. The only portion of the opinion as to which there can be any question is that dealing with a "third proposition" (App. A, *infra*, pp. 7a *et seq.*), in which the court insisted that the "production" of wheat for consumption on the farm did not involve "commerce." However, since the Act did not in any way distinguish between the two terms, and since the applicability of the Act to production for home consumption had been solidly established since *Wickard* v. *Filburn*, 317 U.S. 111, 118–19, the court's ruling can only have meant that "production" was not within the reach of the Commerce Clause. Indeed, the court seems to have made that meaning explicit when it said (still under the "third proposition" of its opinion), "You have to extend the law to production in order to administer any punishment in this case," and then immediately went on to quote an early lower court decision: "But congress certainly has not the power or authority under the commerce clause, or any other provision of the constitution, to limit and restrict the right of * * * the citizens of the states, in the acquisition, control, and disposition of property" (App. A, *infra*, p. 8a).

However the court articulated its ruling, since in fact its entire decision was grounded upon the lack of congressional authority to provide penalties for the mere production of wheat, this Court plainly had jurisdiction under 28 U.S.C. 1252. See *United States* v. *Raines*, 362 U.S. 17, 20.

Moreover, even if the original decision of the district court had some basis in a non-constitutional ground, this Court still had jurisdiction under 28 U.S.C. 1252, for at the very least the district court ruled in the alternative that the Agriculture Adjustment Act is unconstitutional. After discussing at length its view that the Commerce Clause did not authorize Congress to enact legislation to control production, the court said that it was "not going to base this decision *solely* on this point" (emphasis supplied; App. A, *infra*, p. 6a), thus acknowledging that its decision was in part at least founded on the proposition that the Act is unconstitutional. Indeed, the conclusion that the decision was so based is inescapable from a reading of the opinion as a whole. And it is well settled that 28 U.S.C. 1252 confers jurisdiction upon this Court for direct appeals where a district court holds an Act of Congress unconstitutional, even if only in the alternative. *United States* v. *Rock Royal Co-operative*, 307 U.S. 533, 541.

CONCLUSION

By improperly inquiring into this Court's jurisdiction to issue its mandate, the court below committed plain error. Summary reversal of the order under review would seem appropriate, with instructions to the district court to resolve the questions raised by appellee's alternative affirmative defense (*i.e.*, that there had been no compliance with conditions precedent to the valid establishment of a wheat acreage allotment for appellee) and enter final judgment accordingly.

Respectfully submitted.

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ALAN S. ROSENTHAL,
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Attorneys.

MAY 1962.

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. Misc.

UNITED STATES OF AMERICA, PETITIONER

v.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

ON MOTION FOR LEAVE TO FILE A PETITION FOR A WRIT OF MANDAMUS AND ON PETITION FOR A WRIT OF MANDAMUS

CONDITIONAL MOTION FOR LEAVE TO FILE A PETITION FOR A WRIT OF MANDAMUS

The United States, by the Solicitor General, respectfully moves that it be granted leave to file the following petition for a writ of mandamus to require the United States District Court for the Northern District of Texas to comply with the mandate of this Court previously issued in the case of *United States* v. *Haley*, No. 587, October Term, 1958. This motion is conditioned upon the Court's deciding not to assume jurisdiction in this case upon direct appeal.

PETITION FOR A WRIT OF MANDAMUS

The United States, by the Solicitor General, respectfully petitions this Court to issue a writ of

mandamus to require the United States District Court for the Northern District of Texas to comply with the mandate of this Court issued in the case of *United States* v. *Haley*, No. 587, October Term, 1958, on February 24, 1959 (see App. D, *infra*, p. 17a).

The opinions below, the statutes involved, the questions presented and the statement of the case with respect to this petition are identical to those in the appeal of the United States in *United States* v. *Haley*, as set forth in the Jurisdictional Statement therein to which this petition is attached; and those portions of the Jurisdictional Statement (pp. 1, 2–7, *supra*) are incorporated herein by reference. Similarly, the same considerations that justify the assumption of jurisdiction on direct appeal by this Court (pp. 7–11, *supra*) equally warrant the issuance of a writ of mandamus to enforce the mandate of this Court, for the United States seeks essentially the same relief by way of mandamus that it seeks by way of direct appeal. Jurisdiction to issue the writ lies under 28 U.S.C. 1651.

REASONS FOR GRANTING THE WRIT

We are of the view that the district court's refusal to comply with this Court's mandate in *United States* v. *Haley*, *supra*, can be corrected either by appeal or by writ of mandamus. See *Baltimore & O. R. Co.* v. *United States*, 279 U.S. 781, 785; *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255. If we are correct in that regard, then there will be no need for a ruling upon this petition.

On the other hand, if the Court does not assume jurisdiction over the appeal of the United States in this proceeding, mandamus will offer the only adequate and appropriate remedy. For it appears to be settled that the enforcement of the mandate of a particular court is a matter for that court alone, even though it may otherwise have no existing or future appellate jurisdiction over the case. *United States* v. *United States District Court,* 334 U.S. 258, 263; *In re Washington & G. R. Co.,* 140 U.S. 91. Accordingly, it would not appear to be appropriate for the United States to attempt to secure the enforcement of this Court's mandate in a court of appeals.*

Mandamus is, of course, a proper means of securing compliance with a mandate, where a lower court has failed or refused to comply with the mandate of a higher court; indeed, this Court has described that as "a high function of mandamus." See *United States* v. *United States District Court, supra,* 334 U.S. at 264; see, also, *In re Potts,* 166 U.S. 263; *Gaines* v. *Rugg,* 148 U.S. 228; *In re Washington & G. R. Co.,* 140 U.S. 91. Accordingly, mandamus is appropriate here if relief cannot be obtained by appeal.

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*As a precautionary measure, the United States has noted an appeal to the United States Court of Appeals for the Fifth Circuit to preserve its right to such an appeal should it be wrong in believing that this Court is the appropriate one to enforce its own mandate.

CONCLUSION

For the foregoing reasons, if this Court decides against exercising jurisdiction under 28 U.S.C. 1252, a writ of mandamus should issue requiring the district court to comply with the mandate of this Court in *United States* v. *Haley*, No. 587, October Term, 1958, dated February 24, 1959.

Respectfully submitted.

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MAY 1962.

APPENDIX A

In the District Court of the United States for the Northern District of Texas, Dallas Division

No. 7077

UNITED STATES OF AMERICA

v.

EVETTS HALEY, JR.

September 10, 1958

The COURT. Gentlemen, we were inclined to withhold our opinion and reduce it to writing. We doubt, however, if we can say what we want to say or what we believe any better in writing than we can say from the bench.

This case, in so far as dollars and cents are concerned, is of small moment, but it involves a question that affects millions of our citizenship. The whole agricultural industry of the nation is affected by this decision, if the Court sustains, or if the Court refuses. In other words, the ultimate decision and the ultimate action of our Government on the question here involved will determine the future of the agricultural population to a very large degree.

In this case the defendant has been sued, we might say prosecuted, for planting wheat. For planting wheat and for harvesting it and feeding it to his stock, the allegation is that he has, within the bounds of the Constitution, violated the Agricultural Act and is due to be penalized, in the sight of the law.

There is such a thing as allowing a time-honored practice, sentiment and feeling to go on for ages until it becomes part of the warp and woof of the people themselves.

Nineteen hundred years ago a man uttered these words, "I have a right to do as I will with mine own," and for nineteen hundred years that has been one of the pillars and fundamental belief and faith of our people.

You may scoff at the idea of Christian civilization, if you wish. You will find it expressed in 46 of the 48 Constitutions of the states of the Union; you will find it expressed in words like this, "Humbly invoking the help of Almighty God we do now ordain and establish this Constitution."

We have a people in favor of constitutional government. And on that supposition we have lived, starting with the declaration, "I have a right to do as I will with my own."

I had never heard that questioned until about 1941 when one of our leading economists who was widely accepted at that time gave out a statement that when the World War was over we would not return to the former days of free enterprise and freedom of activity that we formerly had and enjoyed in the days of our fathers because, "We are now entering into a managerial revolution." It was discussed among the lawyers at the Bar meeting. I couldn't conceive of its really coming into effect, but when we hear the evidence in this case, when we hear the testimony of Mr. Benson, we realize that the managerial revolution is, in fact, here. A man cannot longer do as he pleases with his own.

We might, in addition, look to the father of free government, the father of Democracy, Thomas Jefferson, "Let every man, with the gift that God has given

you, work out your own fortunes with a just government." A little further he said, "The government that governs least governs best."

And in our own generation a great jurist, Judge Brandeis, of the United States Supreme Court, says that the inalienable right of man is to be let alone. Man in his efforts to make his fortune has a right to be let alone, unless he is interfering with somebody else.

Now, the law has been attacked by counsel for the defendant. It has been sustained by our higher courts. I hardly think, however, that the court that sustained this law had before it the record that has been made here, with its direful effect upon the public. They probably had no information of what the ballot was that was submitted to the farmers. And if you take into consideration that when this balloting takes place the farmer is made to know that he has a guarantee of a certain price if he cooperates and none if he does not. Suppose a different ballot, worded thus: "Do you as a farmer, favor the government supervision of production?" Then could you forecast the result? It is not a question of marketing; it is a question of whether production is unlawful and in violation of the Constitution.

There are some eighteen different things that the Constitution says Congress may or may not do. We might just casually look at some of those: It has a right to borrow money; a right to regulate commerce; make a treaty with foreign nations; a right to coin money; a right to establish post offices; a right to constitute inferior tribunals of the Supreme Court; a right to declare war, and provide maintenance to the navy, and in all about eighteen.

There is nothing in there that says Congress shall have the power to regulate production in agriculture.

There is nothing in there that says you may levy an income tax. There is nothing in there that says you might enact national prohibition, but we did enact a constitutional amendment for each and did enact a law of national prohibition and one for income tax. We have as yet no constitutional amendment authorizing either the Congress or the Secretary of Agriculture, or the Department of Agriculture to tell the farmer what he may plant and what he may do in his farm work.

When the Constitution was adopted many objections were urged because there was not a Bill of Rights.

North Carolina adopted a most excellent Bill of Rights; Virginia adopted one not quite so lengthy; so did Rhode Island and others. Then it was referred to Congress and James Madison worked those things over and reported them and it was submitted to the people and ten of them were adopted. So they became immediately a part of the Constitution of the United States.

The Tenth Amendment says: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

Now, it is said the Constitution authorized this law. If it authorizes it under anything it is under the 8th sub-section of Article I which deals with commerce among the states. It is sub-section 3 of Sec. 8—to regulate commerce with foreign nations and among the several states and with the Indian tribes.

So this legislation we now have before us is sought to be made constitutional under that provision.

Therefore, we are relegated immediately back to the word "commerce." Production is not commerce.

It has been held in the years gone by, by our courts and it appears in almost every dictionary you consult, that production is not commerce. It may pass into commerce, but it is not commerce until it does. I am not changing my views; I am adhering to decisions I have heretofore rendered.

On one occasion we were called upon to determine whether the cotton that the cotton farmer still owned was in commerce; he put it in a warehouse and he hadn't sold it. We held it was not in commerce, and was not until he sold it. The fact that it is production that could go into commerce is only a possibility and a contingency.

One of our former justices of the United States Court, Judge White, who was Chief Justice about the time some of you older men were born, lived in Louisiana, and was one of the most eminent justices of our nation, says in the case of Hooper against California: "If the power to regulate interstate commerce applied to all incidents to which said commerce might give rise, and to all contracts which might be made in the course of its transactions, that power would embrace the entire sphere of mercantile transactions in every way connected with trade between the states, would exclude the states' control over many contracts that are purely domestic in nature." 155 U.S. 648–655. The Hooper case.

If this law is finally upheld, I think it should be definitely stated by our courts that intrastate commerce has been abolished and that the states have no control over even their domestic commerce.

Now, out of sixty million acres of land planted in wheat this defendant planted forty. I won't take a pencil and see what percentage it would be, but it would be a very small percentage. Well, you say, it

is small but we notice it because it is the far reaching principle involved. If it is unlawful for him to produce something on his 40 acres that *might* get into interstate commerce, then if a woman goes into her garden and gathers a gallon of beans, or, if it is red beans and a farmer gathers them out of his field and consumes them on his table maybe he has done something that affects commerce because if he hadn't raised them and hadn't eaten them he might have bought them from the trade and therefore someone in New Mexico would have sold him a gallon of beans, because these things *could* enter into interstate commerce. Let this be established so clearly that we and the members of the Congress will know that there is no such thing as intrastate commerce any more.

Now, I am not going to base this decision solely on this point because if there can be a definite decision of an issue or controversy between men without denouncing any act as unconstitutional it is better to put it on the other paragraph where one is present.

I am going to notice now for a moment the tendency of doing things under the so-called General Welfare Clause of the Constitution.

In Curtis' Constitutional History, written a little over a century ago under the auspices of Daniel Webster, who was one of the great constitutional lawyers of the land, he definitely stated, as contended by counsel today, that the General Welfare Clause was not an affirmative provision of the Constitution authorizing any act whatever. What is the general welfare? I would daresay that the 30 tyrants of Athens thought they were acting in the general welfare of Athens.

I would daresay that the Imperial Caesars at times at least thought they, too, were acting for the general welfare.

General welfare is what we think it is and if you are doing what you believe to be the best, then you may be doing it for the general welfare. If we adopt general welfare as part of the Constitution authorizing us to act on laws we do away with the Bill of Rights. If you pass a law prohibiting the freedom of the press, and can get a judge to hold that it is in the interest of the general welfare, what becomes of that limitation in the Constitution? If you pass a law doing away with freedom of religion, and you can get a judge to hold that it is in the interest of general welfare, what becomes of that guarantee of the Constitution?

General welfare has no place as an affirmative part of the Constitution, any more than if we had said when we adopted the Constitution that the good of the people shall be one of the moving purposes of the Congress.

When everything moves well, when the law is enforced and people prosper we have general welfare, and that is what the Constitution was talking about.

Not only does Mr. Curtis in his History of the Constitution say it, but so does Mr. Norton in a more modern treatment of the Constitution.

President Monroe takes the same view; so does Andrew Jackson.

The General Welfare Clause of the Constitution is not an affirmative part of the Constitution, and if it is then all of the balance of the document has gone by the board and we have a government of men and not a government of law.

Coming now, then, to a third proposition: The government has not made a case against this defendant. It has charged him with violating the Agricultural Marketing Act. Take all of the exhibits that have been offered here, and what are they called? Market-

ing acts, they are not production acts. All he has violated is the rule against production. He marketed nothing; he sold nothing. He produced something and he fed it to his own livestock. As Justice White said, it might enter interstate commerce, but no one knows that the cows that ate the wheat entered interstate commerce. That which is produced is not commerce. No, not until it is made such.

What is commerce? Take your best text on the subject. We have copied one here: "Commerce strictly consists in the intercourse, including the terms and negotiations and transportation, like the transit of property and persons, as well as the purchase and the sale and the barter of commodities," citing In Re Green, 52 Fed. 112, and other authorities.

Has this man had anything to do with commerce? Only in production. You have to extend the law to production in order to administer any punishment in this case.

> "* * * But congress certainly has not the power or authority under the commerce clause, or any other provision of the constitution, to limit and restrict the right of corporations created by the states, or the citizens of the states, in the acquisition, control, and disposition of property. Neither can congress regulate or prescribe the price or prices at which such property, or the products thereof, shall be sold by the owner or owners, whether corporations or individuals. * * * Commerce among the states, within the exclusive regulating power of congress, 'consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, as well as the purchase, sale, and exchange of commodities.'" 52 F. 112, 113.

> "* * * The word 'commerce', as used in the statute and under the terms of the constitution, has, however, a broader meaning than the word 'trade.' Commerce among the states consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale, and exchange of commodities. County of Mobile v. Kimball, 102 U. S. (697), 702." 62 F. 841.

Moreover, a subject that was not discussed appealed to me. The farmer Clements who lived next to the defendant testified that defendant did plant wheat. He also testified that he had a farm and could plant 15 acres of wheat. "What do you plow with?" "With a tractor that cost $1,000; with a distributor that cost $750.00; with a reaper that cost $950.00," and what has he got to pay it back with? The profit of 15 acres of wheat.

We asked the first witness that testified in the case, Mr. Rainwater, "Can a man support his family, pay for his equipment and own a farm under such regulations?" And I might say to the credit of the witness he agreed he could not, and the results are abundantly shown that he cannot. Just take the country over, in 1940 there was a census taken. In 1950 there was another census taken. This farm is in Oklahoma. Those farms have reduced in number considering that ten years, the population in the whole state of Oklahoma has decreased during those ten years by 4 per cent. Arkansas decreased nearly as much, North Dakota almost as much. Mississippi farm population decreased, and most of the agricultural states were able to hold their own by having some large industrial cities within their boundaries.

Not only with the other states, but let us come close to home. Let us walk over the line into Kaufman County, and what happens in Kaufman County, Texas? Between 1940 and 1950 the farm population decreased from 26,000 to 16,000.

Well, go back to Red River and Lamar County: In 1940 the farm population was 31,000 and in 1950 it was 21,000. The farmers were gone.

In Navarro County the farm population in 1940 to 1950 shrank from 20,000 to 16,000.

In east Texas, the old settlement of Nacogdoches shrank in that ten years from 27,000 down to 17,000.

Cass County sank from 33,000 down to 22,000.

It was offered in evidence here something on the trend since 1950, during the last seven years. This is compiled on the Texas farm population by the Texas Agricultural Experiment Station, at A & M College. According to estimate, based on a statewide survey conducted by the State Agricultural Experiment Station and the Agricultural Marketing Service of the United States Department of Agriculture, 1,018,000 people were living on farms in 1957. Just seven years previous the farm population was 1,387,000. Thus the number of farm residents has decreased by 369,000 during seven years, or a decrease of 26 per cent-plus in these years. This in addition to loss between 1940 and 1950.

I can understand the vision that was in the mind of Goldsmith when he said:

> Ill fares the land where hastening ills prey;
> Where wealth accumulates and men decay.
> Princesses and lords may flourish or may fade,
> A breath may make them, a breath has made,
> But a bold yeomanry, a country's pride,
> When once destroyed can never be supplied.

Public policy—while not the intent of the Congress, the Agriculture Department has so construed its pow-

ers it has created a practice which is against public policy and is unlawful. A public policy which is injurious to the entire people is unlawful. You cannot perform a greater injury to the American citizenship than to destroy even in part the agricultural population.

Whichever way you may look the young man is not behind the plow. Before the regimentation of agriculture started he was, but now he can find better fields in industry, and the man that operates the farm has trouble in getting labor; he has to take the old man that industry won't use.

View it in another way; view it as Jefferson did when he advocated public education. He knew, as everybody knew, that when one man was to be taxed to educate another man's child, it was a socialistic idea, but it was justified, according to Jefferson, because it would insure the perpetuity of free government by reason of an intelligent suffrage; therefore, he felt it would be justified.

I sat at one time a few years ago with a very learned judge at a dinner table, and I regard him as one of the greatest jurists that ever graced the American bench. He asked me this question—he was discussing matters pertaining in part to elections, and he said, "We have a bloc who has one spokesman and that spokesman can cast 250,000 votes in the state, and that man can go to the headquarters of one political party and say, 'If we give you our 250,000 votes how many members of the Legislature will you give us?', or 'How many seats in Congress will you give us?', or 'How many contracts with profit in them may we have?', and after making the best bargain he can, then he goes over to the next one to get them to raise the ante, and when he has peddled his 250,000

votes back and forth the public pays for the transaction."

The more blocs, the more groups that can be voted, the greater danger to the nation. The most independent thinking group that America has ever had has been the middle class of American farmers.

We learn from the evidence in this case that the upper group of farmers, those who are able to farm on a large scale, will survive, but the middle class and the lower class are selling their farms and going away.

I am thinking about an old school history, of another nation, the great civilization of France:

> "* * * peace prevailed; justice was impartially administered; industry flourished; the taxes were light; the towns practically possessed self-government; agriculture improved; * * *
>
> "But this age of prosperity was not to last * * *
>
> "* * * The small farms were one by one bought up by wealthy men, who converted them into extensive cattle and sheep pastures tended by a few slaves. Thus the independent peasant population was gradually driven off the land, and agriculture declined * * *" The Leading Facts of French History by D. H. Montgomery, page 14.
>
> "The law, in fact, regulated everything. A man could not set a price on his own goods; the government did it for him. These oppressions destroyed all public spirit and desire for life." Montgomery's History of France, page 16.

I consider the interpretation of the Act given by the Department of Agriculture as being against public policy and as destructive of a great branch of our civilization, the agricultural branch.

In many places more than half of them have been driven from their homes and their houses are vacant.

Start here and drive through Denton County, and then down through Ellis County and back to Hunt County, and those prosperous blackland counties, and go down through Kaufman County, and get off of the highways and see how many vacant houses there are. We wonder where all the people in the cities come from, but if you will go out there you will stop wondering. Fully half of the population of the rural districts are now residing in the cities.

All of this shows that the regimentation of the farm and this managerial revolution and these practices which prevail are bad, and our Congress would do well to read the testimony of Mr. Benson; they would do well to read the record that has been made in this case, and then they should ask themselves if it is their purpose and their intention to wipe out entirely that provision of the Constitution that draws a distinction between interstate commerce and intrastate commerce, and to say that everything in the way of production is also commerce.

This man's only violation of any rule has been the violation of production and not of commerce. He has marketed nothing; he has sold nothing, and he has entered no where into the marts of commerce.

We will enter a judgment in favor of the defendant.

T. WHITFIELD DAVIDSON,
Judge.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

Civil No. 7077

UNITED STATES OF AMERICA, PLAINTIFF,

v.

EVETTS HALEY, JR., DEFENDANT

JUDGMENT

On the 8th day of September, A.D. 1958, came on for trial before the Court, sitting without a jury, the above entitled and numbered cause and came the plaintiff and the defendant by their attorneys and announced ready. The Court having heard the pleadings, the evidence and arguments of counsel, and being fully advised in the premises, on the 9th day of September 1958 rendered an oral opinion containing findings of fact and conclusions of law and found and concluded that the law and the facts are with the defendant and against the plaintiff and that the plaintiff should take nothing by its suit; it is, therefore,

ORDERED, ADJUDGED AND DECREED that the plaintiff, United States of America, take nothing by its suit against the defendant, Evetts Haley, Jr., and that the costs of this action be and the same are hereby taxed against the plaintiff,

To all of which action of the Court plaintiff excepts.

DATED at Dallas, Texas this 17th day of October, 1958.

s/ T. WHITFIELD DAVIDSON,
United States District Judge.

Approved as to form:

BILLINGS & DONOVAN

By s/ JAMES P. DONOVAN
Attorneys for Defendant,

s/ JOHN C. FORD
John C. Ford,
Assistant United States Attorney, Attorney for Plaintiff.

APPENDIX C

SUPREME COURT OF THE UNITED STATES

UNITED STATES *v.* HALEY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

No. 587. Decided February 24, 1959

PER CURIAM.

The judgment is reversed. *Wickard* v. *Filburn*, 317 U.S. 111.

APPENDIX D

SUPREME COURT OF THE UNITED STATES

No. 587, October Term, 1958

UNITED STATES, APPELLANT,

vs.

EVETTS HALEY, JR.

Appeal from the United States District Court for the Northern District of Texas.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the judgment of the said United States District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the United States District Court for the Northern District of Texas.

FEBRUARY 24, 1959.

APPENDIX E

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

No. 7077—Civil

UNITED STATES OF AMERICA

vs.

EYETTS HALEY, JR.

February 2nd, 1962

The COURT: Gentlemen, you have a very interesting case here. I did not receive the defendant's motion for a new trial until this morning just before I started into Court, and at the same hour I also received the Government's motion to enter a judgment, and a suggested finding of facts. I anticipated these things would arise, and that it would have to be based upon the things that occurred during the trial at the time it was before this Court, therefore, on yesterday we took up the decisions and the law with reference thereto.

From the statement of Mr. Donovan it would seem that he has not had his day in court. But as well said by the District Attorney, the Supreme Court is the final arbitrator of these matters and this court has no power to overrule the action of the Supreme Court.

The main question that struck me yesterday on my investigation is, "Had the Supreme Court ever received jurisdiction of the matter on which it attempted to pass," if it did not, then any action it took would be void.

To illustrate what we have in mind. Suppose a case had been tried in the State Court and the case was such that counsel felt that it should go to the Supreme Court of Texas, by-passing the Court of Appeals. The petition and the record would be addressed to the Supreme Court. We can imagine that a stenographer might have had some late experience in transcribing Federal papers, and that the case was sent to Washington instead of to Austin. Suppose under those conditions the Supreme Court received the record and proceeded to decide the case, manifestly their position would be incorrect and invalid, because they had no jurisdiction of the case.

The question, therefore, going back further than the position taken by Counsel Donovan; did the Supreme Court ever receive from this court any appeal over which they had jurisdiction?

We then necessarily look to the law governing appeals from this court, and we turn to that phase of the law which is Title 28, Article 1291, which is very short, and no reason why it might not be understood. Reading Title 28, Chapter 83, Article 1291, the Statute of the United States Revised:

> "The Court of Appeals shall have jurisdiction of all appeals from all final decisions of the District Courts of the United States, and a direct review may be had in the Supreme Court. * * * Except where a direct review may be had in the Supreme Court. That is the Defendant's right to review of the decision of the Circuit Court, we have certain exceptions where the case may go directly to the Supreme Court.

So, we will examine them and see if under any of these that this case has been appealed in a manner that would confer jurisdiction on the Supreme Court. For under the law it was manifestly supposed to go to the Court of Appeals.

Title 1252 is one of the exceptions to the cases not going to the Circuit Court, it reads:

> "Any party may appeal to the Supreme Court from an interlocutory or final judgment holding an Act of Congress unconstitutional."

"Did the Haley decision or judgment entered hold anything unconstitutional?"

Let us examine the next exception.

Title 1253 of the same statute:

> "Except as otherwise provided, direct appeals from decisions of a three-judge court will go to the United States Supreme Court."

This was not a three-judge court, therefore, in order for this case to have been appealable to the Supreme Court of the United States, it must have been heard in a three-judge court asking for an injunction restraining the enforcement of some Act of Congress, or some action or ruling on interstate commerce. That was not the case.

The case here in this court was tried before one judge and there was no injunction asked. It was simply an appeal directly from this court, and that appeal could go to only one place.

The question is: "Is there anything in the Haley decision or judgment that overturns any statute of the United States?"

Knowing we were acting as one judge only, I recall the thought passed through my mind, as I announced the decision from the bench, that the law of the land was entitled to such sanctity that, wherever possible, it should be passed on by three judges, before it could be annulled or held unconstitutional.

I thought if the three judges were not required by law in the given case then if there was any other way the case could be disposed of then the legal ques-

tion should be allowed to go to the Circuit Court where three judges would hear it. With that thought in mind, I at the time put this in the decision:

"I am not going to base this solely on the point, because if there can be a definite decision between men, without denouncing any act as unconstitutional, it is better to put it on such section, better than holding the law unconstitutional."

Not only did I not hold the act unconstitutional, but I said so in so many words, and the last thing in the decision continues with that line of thought.

Every description and every title of the Marketing Act under which the case was brought, referred to as the "Marketing Act," therefore, I continued:

"He has marketed nothing, he has sold nothing, he has entered nowhere into the marts of commerce."

Now, conceding that the decision is contrary to the Wickard case, still there is no similarity as to jurisdiction in the two cases.

If a trial court, in deciding a case, disagrees with one of its decisions, or undertakes to interpret or distinguish it, that has nowhere ever been ground for carrying the case to the Supreme Court. The only way it goes to the Supreme Court is to go to the Court of Appeals, and when that court has acted, if it does not correct the wrong interpretation that has been placed on the decision, then the Supreme Court will correct these on certiorari. The fact that the Court may have entered a judgment contrary to the law in the Wickard case does not authorize an appeal anywhere except to the Circuit Court, and no appeal was had to the Circuit Court. I am not criticizing the Supreme Court.

I remember talking to one of Mr. Roosevelt's secretaries one time and I asked him how many were entitled to sign the President's name, and he said four

or five. So every man is necessarily entitled to his aides. You lawyers sitting at the bar are aides of this judge, so when you tell him matters in certain decisions are so-and-so, and opposing council does not deny it, then he will ordinarily act on what you tell him.

Now, the attorneys for the Marketing Adjustment Act, in their enthusiasm, presented the case to the Supreme Court, and you can see from the nature of the action had that they said: "Here is another one of these wheat cases, it is exactly like the Wickard case." And the Supreme Court, in granting the order it did grant, manifestly never had the Court's decision in the Haley case. Had they read that decision, they would have known no Federal statute had been annulled or set aside. We did not say in the opinion, nor in the order, that the act was unconstitutional.

We thought this Marketing Act, as then existing, was a bad policy, that it was really against public policy, but we didn't say so in our decision or in our judgment.

In the testimony of the case and in the depositions that had been taken of Mr. Benson, then Secretary of Agriculture, he virtually agreed that the Act needed amendment. Reference was made to the fact that the Court at one time suggested that this case be postponed, and when the Secretary of Agriculture suggests that the Act be amended, I think the Court is warranted in waiting to see if the Act is going to be amended.

Not only that, but in yesterday's papers the President of the United States suggested this Marketing Act and the regulating Act be amended.

I did call attention in this decision, which you will find, of the painful effect of this decision, the decision was based upon a statute which was based upon an

inadequate doctrine, that the way to have plenty is to create scarcity, which is a monstrosity which cannot be reconciled.

The remedy to raise the price of these things where the farmer had to compete with labor of foreign lands was to quit raising so much wheat and raising so much cotton.

One of the witnesses testified in this case, a Government witness, he said, "I am a neighbor of Mr. Haley and up there I have been limited to 15 acres that I can plant in wheat." I asked him this question, "If you are limited to 15 acres, how much did you have to pay for the tractor with which to plant and sow it?" Well, he said, "A secondhand $1,000.00, and of course new a little over $2,000.00." And I said, "How much do you have to pay for the drill?" A secondhand one, "$900.00." "How much do you have to pay for the reaper that enables you to harvest the wheat?" "A secondhand one," so many dollars. "Can you pay your expense and pay for your machinery and live by planting 15 acres of wheat?" And he said, "I don't see how I can unless I get some money from somewhere else."

Following that witness was Mr. Rainwater, one of the Government agents charged with the enforcement of that law.

Mr. Rainwater testified that with only 15 acres he did not see how he could pay for his equipment and operate.

Well, I called attention to the effect of that law. Cass County since the enactment of this law had lost 11,000 of its population. They could not any longer make a living.

I know a man fairly close to me, whose company I enjoy, he is a cousin, Dr. Aubrey Little, of Wichita Falls. He was raised in East Texas, where lots of

people have been raised, it is still God's country. He moved to Witchita Falls and got independently rich: he invested in land and the land made him rich. He went back down to East Texas after this law had been in effect and he and his half-brother took a drive—and I want to say the judge is entitled to take into consideration things he knows. They took a drive and they saw on the drive the same thing that the judge sees when he takes a drive. They went through several counties of that area and they saw no more cotton fields. They were growing up in weeds. They saw no more farms being operated on a small scale, only a few of the larger farms were being farmed. They saw practically no gardens. They saw half of the houses vacant and being torn down.

That is the situation that results from curtailing the acreage, and it is only the opposite extreme from paying a small price for your product.

On the first scheme the farmer suffered because he had to compete with those over yonder: and on the second scheme he was allowed to raise enough to feed his family.

Another thing is you may drive through the country, and for the past 20 years, you will scarcely find a farmer that has been able to buy a farm and make a home. He cannot earn enough on the land to buy land. No man anywhere in that territory, so far as I have heard or seen, has been able to buy a home and pay for it from the proceeds of the farm.

I criticized that condition to some extent in my opinion and, therefore, the attorneys for the Marketing Act felt that I was ruling that the Act was unconstitutional. I felt that somebody might feel that way, so I said I was not ruling the Act was unconstitutional, that I was not taking on myself the responsibility of declaring the Act unconstitutional.

Coming back to this decision itself, I want to disclaim any intention of attempting to set aside or to ignore any order of the Supreme Court of the United States, but where it is manifest that the Supreme Court was misled, I think that one is warranted in calling attention to the fact that jurisdiction never attached. In all deference to the Supreme Court if I be out of order, the high court now and here has my apologies.

We will deny the motion to enter judgment.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

Civil No. 7077

UNITED STATES OF AMERICA, PLAINTIFF,

vs.

EVETTS HALEY, JR., DEFENDANT.

ORDER

On the 2nd day of February, 1962, came on regularly for hearing Plaintiff's Motion for Judgment in the above styled and numbered cause, and came the parties by their respective counsel and announced ready for trial; and the Court, having read and considered the Motion, and having heard and considered the argument of counsel, rendered its Opinion (filed February 8, 1962) that said Motion should be overruled.

IT IS, THEREFORE, ORDERED by the Court that Plaintiff's Motion for Judgment be, and the same is, hereby overruled, for the reasons set forth in said Opinion filed February 8, 1962.

To which ruling of the Court, Plaintiff by counsel in open court, excepts.

DONE on this the 26th day of February, 1962.

[s] T. WHITFIELD DAVIDSON,
United States District Judge.

APPENDIX G

1. Section 1252 of Title 28, U.S.C., provides in pertinent part:

> Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam and the District Court of the Virgin Islands and any court of record of Puerto Rico, holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party.
>
> * * * * *

2. Section 1651 of Title 28, U.S.C., provides in pertinent part:

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.
>
> * * * * *

3. The Agricultural Adjustment Act of 1938, 52 Stat. 31, as amended, 7 U.S.C. 1281, *et seq.*, provides in partinent part, as it appears in the United States Code:

> Section 1301(b):
>
> * * * * *
>
> (6)(A) "Market", in the case of corn, cotton, rice, tobacco, and wheat, means to dispose of, in raw or processed form, by voluntary or in-

voluntary sale, barter, or exchange, or by gift inter vivos, and, in the case of corn and wheat, by feeding (in any form) to poultry or livestock which, or the products of which are sold, bartered, or exchanged, or to be so disposed of, but does not include disposing of any of such commodities as premium to the Federal Crop Insurance Corporation under the Federal Crop Insurance Act.

(B) "Marketed", "marketing", and "for market" shall have corresponding meanings to the term "market" in the connection in which they are used.

* * * * *

Section 1335:

* * * * *

(f) The Secretary, upon application made pursuant to regulations prescribed by him, shall exempt producers from any obligation under this chapter to pay the penalty on, deliver to the Secretary, or store the farm marketing excess with respect to any farm for any crop of wheat harvested in 1958 or any subsequent year on the following conditions:

(1) That the total wheat acreage on the farm does not exceed 30 acres: *Provided, however,* That this condition shall not apply to farms operated by and as part of State or county institutions or religious or eleemosynary institutions;

(2) That none of such crop of wheat is removed from such farm except to be processed for use as human food or livestock feed on such farm and none of such crop is sold or exchanged for goods or services;

(3) That such entire crop of wheat is used on such farm for seed, human food, or feed for livestock, including poultry, owned by any such producer, or a subsequent owner or operator of the farm; * * *

* * * * *

Section 1340:

Notwithstanding the other provisions of this chapter—

(1) The farm marketing quota under this chapter for any crop of wheat shall be the actual production of the acreage planted to wheat on the farm, less the normal production or the actual production, whichever is the smaller, of that acreage planted to wheat on the farm which is in excess of the farm acreage allotment for wheat.

The normal production, or the actual production, whichever is the smaller, of such excess acreage is hereinafter called the "farm marketing excess" of wheat. For the purposes of this section, "actual production" of any number of acres of wheat on a farm means the actual average yield of wheat for the farm times such number of acres.

(2) During any marketing year for which quotas are in effect, the producer shall be subject to a penalty on the farm marketing excess of wheat. The rate of the penalty on wheat shall be 45 per centum of the parity price per bushel of wheat as of May 1 of the calendar year in which the crop is harvested.

* * * * *

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Nos. ~~1688~~ and ~~1425~~ Misc.

In the

Supreme Court of the United States

OCTOBER TERM, 1961

UNITED STATES OF AMERICA,

Appellant,

v.

EVETTS HALEY, JR.,

Appellee.

On Appeal From the United States District Court for the Northern District of Texas

UNITED STATES OF AMERICA,

Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

On Motion for Leave to File a Petition for a Writ of Mandamus and On Petition for a Writ of Mandamus

Statement Opposing Jurisdiction, Motion to Dismiss or Affirm, Statement Opposing Leave to File Petition for Writ of Mandamus and Petition Therefor

JAMES P. DONOVAN,
30½ Highland Park Shopping Village,
Dallas 5, Texas,
Attorney for Appellee, Respondent.

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No. 1003

In the

Supreme Court of the United States

OCTOBER TERM, 1961

UNITED STATES OF AMERICA,

Appellant,

v.

EVETTS HALEY, JR.,

Appellee.

On Appeal From the United States District Court for the Northern District of Texas

STATEMENT OPPOSING JURISDICTION, MOTION TO DISMISS OR AFFIRM

FOREWORD

On February 24, 1959, this Court disposed of a prior Appeal, by Appellant in this cause, by a Per Curiam decision: "The Judgment is reversed. *Wickard v. Filburn, 317 U. S. 111.*" The Court then issued a mandate to the District Court making the false recital:

> "This cause *came on to be heard* on the transcript of the record from the United States District Court for the Northern District of Texas, and *was argued by counsel.*"

The falsity of the emphasized statements is evidenced by the record. No hearing was ever had, and this Court flagrantly violated its own rules stipulating that an appropriate

order be entered accepting jurisdiction, denying jurisdiction, or reserving the question of jurisdiction until hearing on the merits *(Rule 16, Sub. Para. 4)*. A hearing on the merits was never granted, and if the case "was argued by counsel", the argument must have been presented in Chambers by Appellant's Attorneys. Counsel for Appellee were denied both argument and the right to file a Brief on the merits.

The extra-legal action of this Court has produced confusion to such an extent that Appellee now finds himself compelled to defend a direct Appeal to this Court, to oppose an Application for Leave to File a Petition for Writ of Mandamus in this Court, and to defend against an Appeal to the United States Court of Appeals, Fifth Circuit—all simultaneously generated by the entry of one order.

Since Appellee still has hope that the Star Chamber Justice of Henry VIII, administered Appellee on the previous Appeal, is the exception rather than the rule in this Court, he will make another effort to demonstrate, to this Court's satisfaction, that it has no more jurisdiction of this Appeal than it had of the prior Appeal.

STATEMENT OPPOSING JURISDICTION

OPINION BELOW

The only opinion relevant to determination of jurisdiction of this Appeal is the unreported opinion of the United States District Court for the Northern District of Texas, set out in Appellant's Statement of Jurisdiction. (App. E, pp. 18a-25a.)

The Judgment entered upon the opinion reported in *166 F. Supp. 336*, was reversed on *one* point of law only. Even if such reversal were legal, there is no law authorizing a second appeal to permit Appellant to remedy errors committed in filing of his first appeal.

The reversal of February 24, 1959, if legal, established the "law of the case" for the District Court only as to the question supposedly reviewed:

> "Whether the *civil* penalty imposed by the Agricultural Adjustment Act of 1938 for wheat produced in excess of a farm's wheat acreage allotment is, as applied to wheat wholly consumed on the farm, within the commerce power of Congress."

Such decision was wholly ineffective to establish the "law of the case" as to the *eleven* other constitutional issues tried before the District Court; the issue as to *whether or not the Secretary's interpretation and application of the Act was constitutional, or void as against public policy;* and the issues as to whether or not the Appellant had complied with *six conditions precedent* to imposition of the penalty. These issues were called to the Court's attention in Appellee's Statement Opposing Jurisdiction and Motion to Dismiss or Affirm (pp. 6, 7) filed in Appeal No. 587, October Term 1958. Appellant failed to deny these issues and did not contend that the Trial Court erred in rulings made thereon. At page 2 of its reply to said Statement it alleged: "The court then disposed of the case *solely* on the theory that the Agricultural Adjustment Act of 1938 is unconstitutional *as here applied* because wheat consumed on the farm, rather than marketed as such, is

not subject to the commerce power." This admission confirmed Appellee's and the Court's contention that the Act was not held unconstitutional, but *that the application of it by the Secretary of Agriculture* was in violation of the Constitution.

The Court's refusal to consider the issues pointed out by Appellee leads to the conclusion that this Court did not consider them within the question submitted by the Appellant on the first Appeal. Therefore the reversal by this Court of one alleged finding of law, could not be construed to overrule the Trial Court's express finding that "the law and the facts are with the Defendant and against the plaintiff". Appellant is without authority to question those findings on this Appeal.

Therefore Appellee contends that the District Court's decision herein on September 10, 1958 is not involved in determining whether this Court has jurisdiction of this Appeal.

JURISDICTION AND QUESTION PRESENTED

Appellant bases its claim to this Court's jurisdiction of the present appeal upon *28 U. S. C. 1252.* (S. J. p. 2.) An examination of the provisions of this section (S. J. App. G, p. 27a) shows that it authorizes a direct appeal to this Court *only* "from an interlocutory or final judgment, decree or order of any court of the United States * * * holding an Act of Congress unconstitutional * * *." The Appellant as pointed out above admits that the *application* of the Act was what the Court held unconstitutional and this holding is not sufficient to activate the cited statute.

The "Question Presented" by the Appellant: "Whether a district court could properly ignore the mandate of this Court reversing its judgment * * *" wholly fails to present a question subject to review under the cited statute.

The Government's secondary claim to jurisdiction is predicated upon this Court's authority to enforce its Judgments and Mandates. Had this Court granted a hearing on the merits of the first appeal, and had the Government attacked all of the findings of fact and law cited by the Trial Court in support of its Judgment, then there might be some merit to Appellant's contention. However, since this Court ruled upon only *one* point of law, without purporting to overrule or pass upon the others involved, it established the "law of the case" for the District Court *only* as to the point ruled on.

Moreover, though this Court apparently missed the Appellant's admission that it was the Court's holding that, *as applied*, the Act was unconstitutional. The Trial Judge has, in two opinions, stated that he did not hold the Act unconstitutional, and has noted that a single judge is prohibited by law from making such a decision. The record clearly supports the Judge's statement, for the trial court denied Defendant-Appellee's prayer for trial by a Three-Judge Court, after which he abandoned his prayer for injunction.

After reversing the Trial Court as to its alleged ruling upon *one* point of law, this Court remanded the case without instruction. A reversal establishes the "law of the case" for the lower Court *only* as to the points passed on in the appeal.

If the Government, illogically fighting shadows, failed to attack all findings upon which the District Court founded its decision, then it cannot now be contended that the District Court is in error in refusing to accept the Appellant's interpretation of what this Court's decision meant; the Trial Court has said that he did not base his decision on the premise submitted to this Court on the Appeal; neither the Government nor this Court have authority to dictate a Trial Judge's decision. The reversal of *one* point of law offers no foundation for the Government's claim that the District Judge must therefore reverse himself on all other findings; clearly such a contention would charge this Court with a usurpation of authority nowhere granted in law.

The District Judge stated that an order made by this Court, without its jurisdiction, is a nullity. This proposition is fundamental law and this Court is no exception to the rule. This Court has never, under its own rules, accepted jurisdiction; it has never been established that the District Court held an Act of Congress unconstitutional within the meaning of the cited section 1252. Without jurisdiction, this Court's orders have no greater effect legally than the wishful statements made by Government Counsel seeking to salvage a case lost, not on stipulated facts, but on the merits, after trial by the Court.

Appellee submits that this Court has no jurisdiction of this Appeal.

STATUTES INVOLVED

The Appellant has quoted *Section 1335 of Title 7 U. S. C.* as being applicable to the case. Should the Court examine this Section (S. J. App. G, pp. 28a, 29a) it will find that *the statute is applicable* "to any crop of wheat harvested in 1958 or any subsequent year". It is undisputed that the crop, upon which the penalty is sought to be imposed in this law suit, was harvested in 1956, *two years before the harvest* of the first crop subject to the cited statute.

Appellant has wholly failed to call to this Court's attention the following pertinent provisions of *Title 7 U. S. C.*:

"§ 1282—Declaration of Policy. * * * and to regulate interstate and foreign commerce in cotton, wheat, corn, tobacco, and rice to the extent necessary to provide an orderly, adequate, and balanced flow of such commodities in *interstate and foreign commerce* * * *."

"§ 1301 (A) (3) For the purposes of this Chapter and the declaration of policy * * * the term 'interstate and foreign commerce means sale, *marketing*, trade, and traffic *between* any State or territory * * * and any place outside thereof; or between points within the same State or Territory * * * through any place outside thereof;' * * *."

"§ 1335 (b) The amount of the national marketing quota for wheat shall be equal to a normal year's domestic consumption and exports plus 30 per centum thereof, *less* * * * (2) *the estimated amount of wheat which will be used on farms as seed or livestock feed during the marketing year.*"

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STATEMENT BY APPELLANT

In Appellant's "Statement" (S. J. p. 3) it is said: "At the trial, appellee's evidence did not controvert the factual allegations of the complaint." Appellee chooses to attribute this gross distortion of the record and repudiation of the District Judge's statement, to the fact that Appellant's present Counsel took no part in the trial of the case nor in the prosecution of the first appeal herein. Such concession to Government integrity is made despite the fact that the record shows that the Government insists in this case that the penalty sought to be collected under the Agricultural Adjustment Act of 1938 is "civil", while in *Western Fruit Growers v. United States, 124 Fed. 2d 381,* the same Government successfully sustained the proposition that the same Act was a "penal statute", to oust the California State Court of jurisdiction thereunder. Such inconsistency is no less appalling to Appellee, than this Court's repudiation of controlling statutes and its own rules in disposing of the first appeal filed herein.

CONCLUSION

A reading of the statutes set out above shows that Congress declared its policy in enacting the Agricultural Adjustment Act of 1938 to be "*to regulate interstate and foreign commerce in cotton, wheat,* corn, tobacco and rice." It defined the commerce which it proposed to regulate to include "*marketing* * * * *between* any State and any place outside thereof." The marketing definitions relied upon by appellant must be applied in relation to these definitions, and limited to "marketing" *between* the states. Such a construction is a

fair interpretation of the Congressional intention to act only within the scope of the power granted to it by the Constitution, and is the construction given the Act by the District Court in the instant case.

The District Court having found: "Has this man anything to do with commerce? Only in production. You have to extend the law to production in order to administer any punishment in this case," held: *"I consider the interpretation of the Act given by the Department of Agriculture as being against public policy and as destructive of a great branch of our civilization, the Agricultural Branch."*

Clearly this is not a holding that the Act was unconstitutional within the specifications of *Section 1252*, supra. It is equally clear that since *Section 1335 (b)*, supra, expressly directs the exclusion of wheat used for seed or feed for livestock on farms, in computation of the national marketing quota by the Secretary, that the Congress did not contemplate that seed and livestock feed were to be subject to regulation. The acclaimed authority, *Wickard v. Filburn* made no effort to concede to Congress the intention to act within its delegated powers; it is authority for nothing, since the failure to establish what disposition was made of the wheat involved dissipates the illusionary justiciable controversy. It should be excluded from the law of this country, as an unwarranted abandonment of the authority of this Court to the pressures of well meaning but misguided political demagogues. As stated by Justice Brennan in *United States v. Rains, 362 U. S. 17*, writing for the Court: "This Court, as is the case

with all federal courts, has no jurisdiction to pronounce any statute, either of a State or the United States, void because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies." Conversely, this Court has no right to abstractly declare a statute to be constitutional as applied to all cases; it can only make such a ruling when it is called upon to adjudge the legal rights of litigants in actual controversies. Under this rule *Wickard v. Filburn* cannot determine the Appellee's rights in the case at bar.

In order to obtain jurisdiction of this Appeal this Court must amend the Constitution to grant Congress power to regulate intrastate production. Appellee asks if this Court, by such action, is willing to declare that the United States Supreme Court, not the Constitution, is "the Supreme Law of the land"? Will it rule that the American constitutional doctrine of the delegation of limited powers, with the reservation of residual power to the people, is abrogated as of now? Will this Court perpetuate the device, availed of in the past, to mold and modify the Constitution by "construction"? Will it redefine our language to the end that "social progress", espoused by "enlightened" politicians, shall develop, in disregard of individual liberty? If the Court is willing to accept this responsibility, then it should take jurisdiction of this Appeal, and *forever abolish the legal distinction between interstate and intrastate commerce.* It should express, in living language, its complete repudiation of the authority established by the Constitution in the interest of establishing

dictatorship. This type of decision the people can understand and contest; they are powerless to resist the insidious attacks made under the guise of "construction".

Appellee respectfully requests that this Appeal be Dismissed for Want of Jurisdiction. In the alternative, he prays this Court to confirm the Constitutional principles set forth in the opinions of the District Judge; a Judge, who, in long years of judicial experience, has learned to appreciate the true value of such principles in the preservation of our American way of life; such confirmation can be given by affirmance of the Judgment appealed from.

Respectfully submitted,

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In the

Supreme Court of the United States

OCTOBER TERM, 1961

No. 1426 Misc.

UNITED STATES OF AMERICA,

Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

On Motion for Leave to File a Petition for a Writ of Mandamus and On Petition for a Writ of Mandamus

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RESPONDENTS' STATEMENT IN OPPOSITION

In answering Petitioner's Application for Leave to File a Petition for Writ of Mandamus, Respondents incorporate herein by reference all pertinent material set forth in the foregoing Statement Opposing Jurisdiction and Motion to Dismiss or Affirm.

Further answering said Motion, Respondents submit that Petitioner in his application and Petition has wholly failed to meet the requirements of Rule 31 of the Rules of this Court, in that he has failed to establish with particularity why the relief sought cannot be obtained in any other court.

An analysis of the Petition shows that Petitioners claim for relief is predicated upon the theory that the District Court has refused to obey a mandate issued by this Court. Such contention is wholly without support in the record, for while Petitioner contends that the Trial Court is obligated to reverse its judgment entered herein because the Supreme Court held that the Agricultural Adjustment Act was constitutional under the Commerce Clause of the Constitution, the record demonstrates that the District Judge did not render his Judgment on such a ruling. In fact the District Judge in his original opinion specifically stated that he was not placing his decision on that ground; and went on to hold that the application of the Act was in violation of the Constitution. In his opinion, rendered in connection with the order denying Petitioner's Motion for Reversal of the Judgment, the District Judge affirmatively stated that his original opinion and judgment were not granted upon his determination that the Act was unconstitutional. He further pointed out that he was without jurisdiction to enter such a judgment in view of the Statutory reservation of this type of determination to a Three-Judge Court.

In arriving at the decision on which the mandate was issued, the Supreme Court accepted, without legal justification, the Government's claim as to what the District Court held. It is not within the province of this Court to attribute to a District Court a conclusion which is not clearly stated

by that Court. No showing has yet been made by Petitioner that the District Court ever held the Act unconstitutional, and if there were ever any doubt about the question, it is wholly resolved by the opinion of February 2, 1962. (S. J. App. E, pp. 18a-25a.) Where is there authority in law, for this Court to make a determination repudiating a Judge's affirmative statement as to the basis of his judgment?

Assuming for the purpose of argument only, that the Supreme Court was correct in holding that the District Court did hold the Agricultural Adjustment Act unconstitutional; does that give the Supreme Court authority to command the reversal of the Judgment appealed from when the record shows that such Judgment was not predicated solely on that ground? Does this Court have the right by mandate to order a Judge to disregard in toto the findings of law and fact which he has made after an extended trial, developing voluminous evidence on the numerous issues raised by the pleadings? We know of no such legal right.

That other normal remedies are available to the Petitioner is evidenced by the fact that he has already filed Appeals to two Courts. It is established law that the extraordinary writ will not be granted when another remedy is available.

Further, the relief prayed for by Petitioner would call for an order of this Court prohibiting the District Court from exercising the discretion vested in him as a District Judge.

This Court did not see the witnesses or hear the evidence. By what right can it claim to direct a Trial Judge to render a certain decision? It has none.

Respondents submit that the action of the Petitioner is but another move in its poljcy of harassment of the Defendant-Respondent. Having lost its cause after a trial on the merits, it now asks this Court to set aside the Judgment because of this Court's holding that the District Judge was in error on one point of law. Having failed to appeal the Judge's ruling on the other points of law and fact upon which the original judgment was predicated, he cannot now enlist the aid of this Court to overrule those findings made by the District Court.

The only "law of the case" established by the Court's mandate, which was binding on the District Court, was and is that *if* the District Court had held the Agricultural Adjustment Act of 1938 unconstitutional, then to that extent, and to that extent only, the Judgment was to be reversed. Respecting the Court's mandate the District Judge has by written opinion denied that he has ever held such Act unconstitutional, and further affirms, in holding that the Judgment must stand, that it is not based on such a ruling.

This Court is wholly without jurisdiction to entertain the filing of the Petition for the Writ prayed for.

Appellant submits that the Application for leave to file the Petition should be denied, and if such Petition be accepted by this Court, it should be dismissed.

The decision of the District Court on February 2, 1962, has laid to rest the only contention raised by the Petitioner on appeal. This Court should put an end to this litigation. The Application must be denied.

Respectfully submitted,

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